

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
July 8, 2009 Session

**IN THE MATTER OF D.M.**

**Appeal from the Chancery Court for Lawrence County**  
**No. 13452-07     Robert Lee Holloway, Jr., Judge**

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**No. M2009-00340-COA-R3-PT - Filed August 12, 2009**

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Father appeals termination of his parental rights under Tenn. Code Ann. § 36-1-113(g)(6) and argues that an order terminating such rights must be entered prior to expiration of a 10-year criminal sentence. The department also appeals and claims the trial court erred in failing to find by clear and convincing evidence that Father abandoned his child by exhibiting a wanton disregard for his welfare under Tenn. Code Ann. § 36-1-102(1)(A)(iv). We find Tenn. Code Ann. § 36-1-113(g)(6) does not require that the order to terminate be filed during a 10-year criminal sentence. We also find clear and convincing evidence in the record that Father exhibited a wanton disregard for his child prior to incarceration and, consequently, the ground of abandonment under Tenn. Code Ann. § 36-1-102(1)(A)(iv) was also established.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court**  
**Affirmed as Modified**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Stacie Odeneal, Loretto, Tennessee, for the appellant, J.D.M.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Jill Z. Grim, Assistant Attorney General, for the appellee, State of Tennessee, Department of Children's Services.

**OPINION**

**I. FACTS**

The basic facts of this matter are not disputed. The child, D.M., was born in July of 1995. In August of 2000, Father pled guilty to charges of theft, aggravated assault and felony reckless endangerment. Father agreed to a total ten (10) year sentence arising from the 2000 charges.

According to Father's testimony, he was on parole for thirty-five months between 2004 and January of 2007. In January of 2007, Father was involved in a domestic dispute and violated an order of protection. He was returned to prison to complete his 10-year sentence in January of 2007. While Father was serving his 10-year sentence, the Department of Children's Services ("Department" or "DCS") filed a petition to terminate Father's parental rights to D.M. on July 2, 2007.<sup>1</sup> Father completed his 10-year sentence in September of 2007.

After Father had been out of jail a little more than a month, he was arrested on November 9, 2007, and charged with aggravated robbery and aggravated assault. Father was in jail on these charges when the hearing was held on the petition to terminate in April of 2008.

During the majority of the time Father was in prison and on parole, D.M. was cared for by family,<sup>2</sup> including a cousin's stepmother in Lawrenceburg, Tennessee. On April 27, 2007, D.M. was taken into state custody as a dependent and neglected child. The family member who had been caring for the child relinquished custody since she said she could no longer handle him. The petition to terminate was filed approximately two and one-half months later, in July of 2007.

Father testified that while he was on parole between 2004 and January 2007, he lived in Nashville and held a variety of day labor jobs but made only 1 or 2 child support payments totaling \$400. Father testified that during the thirty-five (35) months he was on parole between 2004 and January of 2007, he spent a total of between 2 weeks to a month with D.M. According to Father's sister, when Father was released on parole, he left D.M. with her and never came back.

DCS initially petitioned to terminate Father's parental rights solely under Tenn. Code Ann. § 36-1-113(g)(6), a sentence of ten years or more, but later amended the petition to include abandonment by conduct prior to incarceration that evidenced a wanton disregard for the child's welfare under Tenn. Code Ann. § 36-1-102. The trial court made no findings whether Father's behavior exhibited a wanton disregard for D.M. under Tenn. Code Ann. § 36-1-102.<sup>3</sup> However, the trial court found that the incarceration ground had been proved and also found clear and convincing evidence that termination of Father's parental rights was in D.M.'s best interest under Tenn. Code Ann. § 36-1-113(c)(2). Consequently, the trial granted the petition to terminate Father's parental rights on February 13, 2009.

Father appeals, claiming that Tenn. Code Ann. § 36-1-113(g)(6) is not intended to apply after Father had completed his 10-year sentence. Father argues that although he was serving his 10-year

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<sup>1</sup> The Department also moved to terminate Mother's parental rights. Mother's rights were terminated and are not the subject of this appeal. It appears from the record that Mother had little involvement in D.M.'s life.

<sup>2</sup> Between May 18, 2005 and March 8, 2006, D.M. was in the state's custody but was then returned to the care of family. The record has no other information about why D.M. was in state custody or why he was released.

<sup>3</sup> The trial court found there had been no "constructive abandonment" but made no specific findings about wanton disregard under Tenn. Code Ann. § 36-1-102(1)(A)(iv).

sentence when DCS filed its petition, he was incarcerated on other charges when the trial court held the hearing and entered its termination order. DCS, on the other hand, argues on appeal that the trial court erred when it failed to find Father abandoned D.M. under Tenn. Code Ann. § 36-1-102(1)(A)(iv) so that two grounds exist to support the termination.

## **II. ANALYSIS**

The standard for termination of a parent's rights has been set out many times. Most recently, the Tennessee Supreme Court explained:

A party seeking termination of parental rights must prove two elements by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c). First, the party must prove one of the statutory grounds for termination enumerated in Tennessee Code Annotated section 36-1-113(g). *Id.*; *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). Second, the party must show that termination is in the best interests of the child. Tenn. Code Ann. § 36-1-113(c)(2); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

*In the Matter of M.L.P.*, 281 S.W.3d 387, 392 (Tenn. 2009).

Our legislature has identified those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth specific grounds on which termination proceedings can be brought. Tenn. Code Ann. § 36-1-113(g). The statutes on termination of parental rights provide the only authority for a court to terminate a parent's rights. *Osborne v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004). Thus, parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garret*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Only one statutory ground need be proved to support the termination of parental rights, so long as it is proved by clear and convincing evidence. *In the Matter of D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. *In re Valentine*, 79 S.W.3d at 546 (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). Such evidence should produce in the fact-finder's mind a firm belief or conviction as to the truth of the allegations sought to be established. *In re M.L.P.*, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007); *In re Georgianna H.*, 205 S.W.3d 508, 516 (Tenn. Ct. App. 2006).

### **A. Incarceration Under Ten Year Sentence**

The trial court found clear and convincing evidence that the ground set out in Tenn. Code Ann. § 36-1-113(g)(6) existed. That statute provides that a parent's rights may be terminated if:

(6) The parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court;

Father does not dispute that he received a 10-year criminal sentence before D.M. was 8 years old. However, Father argues that this statute does not apply since Father had completed the 10-year sentence by the time the trial court terminated his rights.<sup>4</sup>

This particular statutory ground, however, contains no such limiting language. The statute is quite clear. Grounds exist to terminate parental rights if the parent is confined in a facility of any type under a criminal sentence of 10 years or more and the child is under 8 years of age at the time of the sentence. If these conditions are met, statutory grounds exist to terminate parental rights. It does not matter if the parent may serve less than the 10-year sentence. *In re Adoption of Copeland*, 43 S.W.3d 483, 489 (Tenn. Ct. App. 2000).

Father would have us impose upon the statute a requirement that the termination be effectuated during the 10-year sentence or, as Father's brief phrases it, to "infer boundaries" on the statute. There is no such requirement in the statute. Statutes are to be construed without any "forced or subtle construction which would extend or limit its meaning." *Bryant v. Baptist Health System*, 213 S.W.3d 743, 749 (Tenn. 2006). In other statutory grounds, the legislature has placed time limitations on when the petition is to be filed. *See e.g.*, Tenn. Code Ann. § 36-1-102(1)(A)(i) (petition to be filed when for four consecutive months "immediately preceding" parent has not visited or not supported). Clearly, the legislature could have placed restrictions in Tenn. Code Ann. § 36-1-113(g)(6), yet it did not. Absent language in the statute evidencing legislative intent to place a requirement that the termination order be entered while the parent is serving a 10-year sentence, we decline to do so.

At oral argument, Father attempted to argue that since the Department had failed to terminate Father's rights earlier, then it was somehow estopped from doing so. As a general rule, statutory grounds to terminate parental rights do not create a mandatory obligation on the Department to seek termination.<sup>5</sup> In this case, D.M. had been with family the majority of the time Father was in and out of prison, so it was not necessary to terminate the parents' rights so as to make D.M. available for

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<sup>4</sup>Father also argues he was not aware that agreeing to a 10-year sentence would adversely affect his parental rights and that the trial court that sentenced him should have informed him of this possible consequence. We do not find any such failure by the criminal court, even if it occurred, to have any effect on the termination order that is the subject of this appeal. *See In re M.B.*, 2007-02755-COA-R3-PT, 2008 WL 2229518, at \*5 (Tenn. Ct. App. May 29, 2008) (perm. app. denied July 16, 2008).

<sup>5</sup>Tenn. Code Ann. § 36-1-113(h)(1) lists four circumstances where the Department "shall" file a petition to terminate parental rights; a finding of severe abuse, murder or manslaughter, abandoned infant, or foster care of long duration. Even under these circumstances, if the child is being cared for by a relative, then the Department may at its option elect not to file a petition to terminate. Tenn. Code Ann. § 36-1-113(h)(2). None of those circumstances is applicable here.

adoption. The Department's involvement was triggered when the family member relinquished custody of D.M. and he entered foster care. We find no merit in Father's position.

The statute speaks in terms of absolutes. The legislature decided that whatever else may be the case, if a parent is sentenced to 10-year or more and the child is under 8, then *grounds* exist to terminate parental rights. Whether these rights are in fact terminated depends on the child's best interest. Consequently, if DCS invokes this statute to terminate the parental rights of someone after release who proves to be a good parent, then while grounds may exist, the trial court could find that termination is not in the child's best interest.

#### **B. Abandonment Under Tenn. Code Ann. § 36-1-102(1)(A)(iv)**

A parent's parental rights may be terminated under Tenn. Code Ann. § 36-1-113(g)(1) if abandonment is found to exist as defined in Tenn. Code Ann. § 36-1-102. Under Tenn. Code Ann. § 36-1-102(1)(A)(iv), abandonment occurs when:

(iv) A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and . . . the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child;

DCS argues on appeal the trial court erred when it found no "constructive abandonment," since the evidence was clear and convincing that Father was incarcerated at the time the petition was filed and had exhibited a wanton disregard for D.M.'s welfare prior to incarceration.

The ground of wanton disregard does not require that the conduct referred to occur within the four month window prior to incarceration. *In re Audrey S.*, 182 S.W.3d 838, 865 (Tenn. Ct. App. 2005) ("This test has no analog to the first statutory definition of abandonment, and it is not expressly limited to any particular four-month period."). *See also State Dept. of Children's Services v. V.N. et al.*, 279 S.W.3d 306, 320 (Tenn. Ct. App. 2008) (wanton disregard shown by fact that defendant had been incarcerated nineteen previous times). Further, the conduct may occur before the birth of the child whose welfare is thereby put at risk. *State Dept. of Children's Services v. Harville*, No. E2008-00475-COA-R3-PT, 2009 WL 961782 at \*8 (Tenn. Ct. App. April 9, 2009) (mother's ingestion of cocaine during pregnancy showed wanton disregard for the welfare of the child *in utero* and supported termination of the mother's parental rights on that ground). Examples of wanton disregard might include conduct such as "probation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child." *In re Audrey S.*, 182 S.W.3d. at 867 - 68.

Father was incarcerated when the petition to terminate was filed and for the four months before it was filed. The evidence supports the finding by clear and convincing evidence that Father has exhibited wanton disregard for D.M.'s welfare. After Father was paroled, he admitted that he violated that parole which led to his imprisonment in January of 2007. Father had been out of jail less than a month while these proceedings were pending before he was arrested again for aggravated robbery and assault. While Father was on parole for 35 months between 2004 and 2007 he all but ignored D.M.'s existence. While Father was on parole before he was jailed again to complete his sentence, the record shows he knew how to contact D.M. since he was with Father's relatives for the majority of the time Father was paroled. The record also shows that Father worked during this period. Yet, the evidence and Father's own testimony prove he failed to visit D.M. or contribute to his support although he had the ability to do so. Even if the court credits Father's testimony that during the 35 month parole period - a period of almost 3 years, he saw D.M. for 2 to 4 weeks and paid \$400 child support - under these circumstances such behavior, coupled with Father's criminal behavior, constitutes a wanton disregard for D.M.

Consequently, we find there is clear and convincing evidence to support a finding that Father abandoned D.M. as defined in Tenn. Code Ann. § 36-1-102(1)(A)(iv).

### **C. Best Interests**

Once a ground for termination is proved by clear and convincing evidence, the next inquiry for the trial court is whether termination of a parent's rights is in the best interest of the child, which also must be proved by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c)(2).

Another section of that statute sets out a list of non-exclusive factors for the court to consider in making its determination of best interest:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i).

Father does not argue that the court erred in its analysis of D.M.'s best interest. As evidenced by the trial court's order, D.M.'s best interest was analyzed in the appropriate statutory framework. Consequently, we find no error in the trial court's finding that termination of Father's parental rights is in D.M.'s best interest. We agree with that finding.

The trial court is affirmed in its finding that grounds exist to terminate Father's parental rights under Tenn. Code Ann. § 36-1-113(g)(6). On the issue whether Father abandoned D.M. as defined under Tenn. Code Ann. § 36-1-102(1)(A)(iv), we find that clear and convincing evidence supports a finding of abandonment. The termination of Father's parental rights is affirmed. Costs of this appeal are taxed to Father, J.D.M., for which execution may issue if necessary.

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PATRICIA J. COTTRELL, P.J., M.S.